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Caitlyn E. Stewart
Vice President – Regulatory Affairs

July 19, 2024

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: Schedules of Controlled Substances:
Rescheduling of Marijuana (Docket No.
DEA-1362 and A.G. Order No. 5931-2024)

Dear Attorney General Garland,

The American Waterways Operators (AWO) is the tugboat, towboat, and barge industry's advocate, resource, and united voice for safe, sustainable, and efficient transportation on America's waterways, oceans, and coasts. Our industry is the largest segment of the nation's 40,000-vessel domestic maritime fleet and moves 665 million tons of cargo each year safely, sustainably, and efficiently.

On behalf of AWO's more than 300 member companies, we appreciate the opportunity to comment on the Department of Justice's proposed transfer of marijuana from schedule I of the Controlled Substances Act (CSA) to schedule III of the CSA. While not directly subject to chemical testing requirements established by the U.S. Department of Transportation (DOT), U.S. Coast Guard regulations require mariners in the tugboat, towboat, and barge industry to participate in pre-employment, periodic, random, post-incident, and reasonable cause chemical testing that adheres to the federal workplace testing procedures established by DOT in 49 CFR Part 40.

AWO members are deeply committed to ensuring the safety of mariners aboard their vessels and upholding public and environmental safety in the waterways on which they work. Maintaining a drug-free workplace is vital to meeting those goals. In the spirit of cooperation toward that shared goal of safety, AWO is pleased to offer these comments.

Rescheduling marijuana from schedule I to schedule III poses significant potential consequences to federally required workplace drug testing programs that have not been considered or addressed in this proposed rulemaking. While DOT¹ and Coast Guard² regulations specifically require testing for marijuana regardless of its CSA schedule designation, those regulatory frameworks rest on the Department of Health and Human Services' (DHHS) authority to establish scientific standards including drug metabolite levels and certification of laboratories to conduct specimen testing.³ However, Executive Order 12546, which establishes DHHS' authority to establish those scientific standards, limits that authority to testing for "illegal drugs" to only include "a controlled substance included in Schedule I or II...."

This critical interplay between DHHS, DOT, and the Coast Guard means that rescheduling marijuana to schedule III without express new authority for DHHS to continue setting scientific standards for marijuana as a schedule III controlled substance could jeopardize, and possibly eliminate, the authority of DOT and the Coast Guard to continue requiring marijuana testing for transportation workers.

Under the CSA, the Attorney General must consider eight factors when evaluating a controlled substance's schedule, including "What, if any, risk there is to the public health."⁴ With respect to that factor, the proposed rule concluded that the public health risks of marijuana are merely comparatively lower than other drugs, namely heroin (schedule I) and cocaine (schedule II), despite identifying that traffic deaths in Colorado in which drivers tested positive for marijuana more than doubled from 2013-2020 and stating that the U.S. Drug Enforcement Administration "anticipates that additional data on public safety risks...may be appropriate for consideration."

By undertaking minimal, if any, analysis of the public health risks of marijuana use in situations like roadway accidents, and conducting no analysis of the public health risks that would occur if transportation workers in safety-sensitive roles are no longer tested for marijuana use, this proposed rule fails to adhere to the statutory requirements of the CSA's eight-factor evaluation process. Before proceeding, the Department of Justice must complete a thorough interagency review (to include DOT, Coast Guard, and DHHS) of the impacts rescheduling could have on federally required workplace drug testing programs and take coordinated actions to establish any new authorities needed to continue marijuana testing for transportation workers as a precursor to any regulatory action on rescheduling marijuana.

¹ 49 CFR § 40.3: "*Drugs*. The drugs for which tests are required under this part and DOT agency regulations are marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids."

² 46 CFR § 16.201(a): "Chemical testing of personnel must be conducted as required by this subpart and in accordance with the procedures detailed in 49 CFR part 40."; 46 CFR § 16.113(b): "Each specimen collected in accordance with this part will be tested, as provided in 49 CFR 40.85, for the following: (1) Marijuana; (2) Cocaine; (3) Opiates; (4) Phencyclidine (PCP); and (5) Amphetamines."

³ DOT is mandated by the Omnibus Transportation Employees Testing Act of 1991 to adhere to the scientific standards established by DHHS' Substance Abuse and Mental Health Services Administration (SAMHSA). In referencing and adopting DOT regulations, the U.S. Coast Guard also adheres to those standards.

⁴ 21 USC § 811(c).

Thank you again for the opportunity to submit comments on the proposed transfer of marijuana from schedule I of the CSA to schedule III. We would be pleased to answer any questions or provide further information to assist in your decision-making.

Sincerely,

A handwritten signature in cursive script that reads "Caitlyn E. Stewart". The signature is written in a dark ink and is positioned above the printed name.

Caitlyn E. Stewart
Vice President – Regulatory Affairs